FILE COPY

Office Supreme Court, U. S.
FILED
OCT 1 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 10

MITCHELL CLIFTON ANDERSON, JOHN EDWARD SIMONDS, EARL HUBBARD, FELTON MOORE WOODWARD, MARION LUTHER ELLIS, ROBERT LEE BALLEW, JOHN DAVID QUEEN, ROBERT LEE RHODES,

Petitioners,

v.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR PETITIONERS

LEE PRESSMAN,
Attorney for the Petitioners.

NATHAN WITT,
of Counsel.

INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Statement	2
Questions Presented	39
Argument—	
I—The confessions of petitioners Hubbard, Simonds, Woodward, Queen, Rhodes, and Ballew were involuntarily made, and were not admissible in evidence against them	40
II—The erroneous admission of any one of the confessions constituted prejudicial error to all other petitioners implicated by such confession	49
III—The lack of corroboration of the confessions of Queen, Rhodes, and Ballew rendered their conviction erroneous as a matter of law	51
Conclusion	56

CITATIONS

Cases:

	PAGE
Berryman v. *United States*, 259 Fed. 208	52
Bram v. *United States*, 168 U. S. 532	41
Chambers v. *Florida*, 309 U. S. 227	42, 43, 45, 48
Cochran v. *United States*, 41 F. (2d) 193	51
Commonwealth v. *Berman*, 181 A. 244	51
Dufour v. *United States*, 37 App. D. C. 497	49, 50
Forte v. *United States*, 94 F. (2d) 236	54, 55
Glasser v. *United States*, 315 U. S. 60	49
Hardy v. *United States*, 186 U. S. 224	47
Langer v. *United States*, 76 F. (2d) 817	55
Lisenba v. *California*, 314 U. S. 219	41, 43, 44, 46
Litkofsky v. *United States*, 9 F. (2d) 877	52
Murray v. *United States*, 288 Fed. 1008, certiorari denied 262 U. S. 757	53
Pearlman v. *United States*, 10 F. (2d) 460	52
Perovich v. *United States*, 205 U. S. 86	47
Pierce v. *United States*, 160 U. S. 355	47
Rosenfeld v. *United States*, 202 Fed. 469	52
Ryan v. *United States*, 99 F. (2d) 864	52
United States v. *Marcus*, 53 Fed. 784, error dismissed *Marcus* v. *United States*, 159 U. S. 259	53
United States v. *Tod*, 263 U. S. 149	47
Vinkemulder v. *United States*, 64 F. (2d) 535, certiorari denied 290 U. S. 666	52, 53
Ward v. *Texas*, — U. S. —, 86 L. Ed. 1101	40, 41, 42, 43, 44, 45, 46, 48
Wiggins v. *United States*, 64 F. (2d) 950	52

Statutes:

Criminal Code:

Section 35 (c)	4
Section 37	4
Section 82, U. S. C.	4
Section 88, U. S. C.	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 10

MITCHELL CLIFTON ANDERSON, JOHN EDWARD SIMONDS, EARL HUBBARD, FELTON MOORE WOODWARD, MARION LUTHER ELLIS, ROBERT LEE BALLEW, JOHN DAVID QUEEN, ROBERT LEE RHODES,

Petitioners,

v.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR PETITIONERS

Opinion Below.

No opinion was delivered by the trial court which sentenced the petitioners after their conviction by a jury.

The opinion of the Circuit Court of appeals affirming the judgments of conviction is reported in 124 F. (2d) 58.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered December 4, 1941 (R. 867). The petition for a writ

of certiorari was filed January 9, 1941, jurisdiction being invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and on an alleged violation of the Fifth Amendment to the Constitution of the United States. The petition was granted on April 6, 1942 (— U. S. —, 86 L. Ed. 865).

Statement

I. The Case as a Whole.

This is a criminal case which arose in the midst of a labor dispute at the mines of the Tennessee Copper Company (hereafter called the Company) situated at Copperhill in Polk County, Tennessee.

The International Union of Mine, Mill and Smelter Workers (R. 615) (hereafter called the Union), affiliated with the Congress of Industrial Organizations (R. 740), called a strike on July 14, 1939, at the Company mines in Copperhill (R. 689). The strike continued throughout the remainder of 1939, and until the offenses alleged in the indictment had taken place (R. 590), although the plant of the Company was reopened on August 28, 1939, after a large number of special deputy sheriffs had been engaged by Sheriff B. E. Biggs of Polk County (R. 550-553). During the course of the strike, petitioner Anderson, who was the national representative and organizer of the Union (R. 614), wrote to the Attorney General of the United States requesting an investigation by the latter into violations of the law against interstate transportation of strikebreakers and guards, and the violations of civil rights which were occurring in Polk County (R. 630-631). Throughout the duration of the strike, which initially involved between 500 or 600 men (R. 588), the Union conducted numerous meetings at which strike activities and relief measures for the families of the men who were out on strike were discussed

(R. 615-617), and at which some of the various petitioners, all of whom except Anderson were strikers (R. 606, 652, 670, 681, 698, 734, 735), were present. From July, 1939, until the conclusion of the strike the Union spent approximately $30,000 in the form of relief for the strikers (R. 614-615).

In the early morning hours of April 1, 1940, two power lines belonging to the Tennessee Valley Authority, a corporation in which the United States was a stockholder, were dynamited, and the service was interrupted (R. 127). On the night of April 14, 1940, two more power towers were blown down (R. 125). On April 16, 1940, Special Agents J. A. Roche and R. T. Mann, of the Federal Bureau of Investigation, arrived in Polk County, Tennessee, and began an investigation of the explosions, working together with Sheriff Biggs of that county (R. 168, 332-333). On April 22, at 3:30 a. m., Sheriff Biggs brought one Freed Long to the New York Hotel in Copperhill, where Agents Roche and Mann were staying. There, Long advised the Agents that the power lines would be blown again at 1:30 a. m. the following night (R. 466-467). No efforts were made to prevent the impending explosions, and the power lines were blown again between 1 a. m. and 2 a. m. on April 24 (R. 467, 125, 128).

Shortly thereafter, as a result of a series of conferences between Sheriff Biggs and Agents Roche and Mann, at least twenty-one of the strikers were arrested without warrants and taken to the Y.M.C.A. Building in Copperhill (R. 268, 270, 540, 556), which was owned by the Company and was at that time being used as a temporary headquarters by Sheriff Biggs, and as a barracks for the special deputy sheriffs (R. 540, 551-553, 733). On April 24 and 25, six additional Agents of the Federal Bureau of Investigation arrived in Copperhill, Polk County, to assist in the investigation (R. 168-169). As the analysis of the evidence concerning the circumstances under which the confessions were made will show, the Agents then proceeded to ques-

tion the various men in custody, doing this continually; different Agents examined the same person at various times during the same day. Virtually all of the questioning was done in the Copper Company's Y.M.C.A. Building (R. 305, 307); at all times between fifteen and twenty-five armed special deputy sheriffs were present in the building (R. 307, 553, 554). After varying periods of detention, petitioners Woodward, Simonds, Hubbard, Rhodes, Ballew and Queen made statements to the Federal Agents, all of which were subsequently repudiated.

On November 14, 1940, an indictment in one count was filed in the District Court of the United States for the Eastern District of Tennessee, charging that the eight petitioners and thirteen other persons had conspired to damage property of the Tennessee Valley Authority, a corporation in which the United States is a stockholder, in violation of Sections 35(C) and 37 of the Criminal Code, as amended, 18 U. S. C., Secs. 82, 88 (R. 2-22).

At the trial, the evidence of the Government consisted principally of the testimony of Freed Long concerning two meetings of the strikers at which the dynamiting of the power lines was allegedly discussed (R. 132-136), and of the confessions of petitioners Woodward, Hubbard, Simonds, Rhodes, Ballew and Queen, each of which implicated other petitioners. The admissibility of these confessions was challenged by the petitioners (R. 167, 775-776), who offered evidence, which is discussed in detail below, that they were made involuntarily. After conducting a preliminary investigation on the question in the absence of the jury, the trial judge rejected the contention of the petitioners and permitted the confessions to be admitted (R. 403, 775-776). After this ruling, the jury heard substantially the same testimony that was given before the judge on the preliminary inquiry. In addition, the Government offered circumstantial evidence implicating some of the petitioners. Exclusive of the confessions, there was no evidence in the record connecting petitioners Rhodes,

Ballew, and Queen with the conspiracy in any way. The trial judge refused to direct a verdict in favor of these three petitioners, as requested by their counsel (R. 579).

The petitioners thereupon offered evidence in their defense. Each petitioner who had made a statement to the Federal Bureau of Investigation repudiated its validity.[1] The testimony of Freed Long was thoroughly impeached, and evidence was offered that his reputation for truth and veracity was bad (R. 584, 585, 592, 593, 599, 775). Evidence was introduced that Long had offered to testify for the defense for the sum of $25 (R. 630, 647). All of the meetings conducted by the Union were shown to have been for ordinary strike and relief purposes (R. 614, 615, 617-619). Witnesses introduced testimony contradicting statements made in the alleged confessions of petitioners Woodward and Ballew concerning their whereabouts on particular days (R. 648-651, 766-767). The theory of the defendants, as stated in the judge's charge to the jury, was that the Company had been utilizing the office of the Sheriff of Polk County in an effort to break the strike, through the creation of an intimidating atmosphere; that the large number of guards and special deputies were employed by the Company through the Sheriff not so much for the purpose of maintaining law and order, but rather to compel a back-to-work movement; and that the destruction of Government property was carried out by persons interested in creating a diversion through which the strike could be broken (R. 837-838).

A verdict of not guilty was directed as to seven of the defendants at the end of the Government's case (R. 582). Five of the defendants were acquitted by the jury; the eight petitioners were convicted (R. 862-863).

On February 3, 1941, petitioner Anderson was sentenced to imprisonment for two years and to pay a fine of $5,000 (R. 31), petitioner Ellis to imprisonment for fifteen months and costs (R. 38), and petitioners Simonds (R. 32-33),

[1] Woodward (R. 707-712); Hubbard (R. 672-678); Simonds (R. 662-666); Rhodes (R. 740-745); Ballew (R. 759-761); Queen (R. 684-689).

Woodward (R. 33-34), Hubbard (R. 34-35), Queen (R. 35-36), Rhodes (R. 36-37), and Ballew (R. 39-40) to imprisonment for two years and to pay fines of $1,000.

The Circuit Court of Appeals affirmed the judgments of conviction (R. 867).

II. The Confessions[2]

An exposition of the circumstances under which the confessions of petitioners Woodward, Simonds, Hubbard, Rhodes, Ballew and Queen were made must include a summary of the evidence concerning the events occurring during the course of the strike until the detention of the petitioners, as well as the circumstances under which they were taken into custody, and the individual treatment accorded them. This is necessary because of the undoubted influence of the preceding events upon the state of mind of the petitioners at the time of their imprisonment and throughout the course thereof.

The strike at the mines of the Company had been in progress for over nine months when the petitioners were arrested. Throughout that period, a large number of special deputy sheriffs, who had been appointed by Sheriff Biggs shortly after the strike began, were quartered at the Company-owned Y.M.C.A. Building in Copperhill, and were engaged in maintaining law and order throughout the area in which the Company's mines were located (R. 551-553). Petitioner Anderson testified that the companionship which he had in his frequent driving trips through Polk County was necessitated by his fear of being ambushed every time he drove down the River Road (R. 620-621). Before the dynamitings, he had conferred with J. B. Frazier, United States District Attorney of the District, in reference to violations of the law in the Copper Basin, as the area in which the Company mines are located is called (R. 630). He had also written to the Attorney Gen-

[2] This part of the statement is necessarily long because the determination of whether or not the confessions were voluntary turns on a close examination of the evidence.

eral of the United States appealing for his assistance in the enforcement of the law and of civil rights in Polk County (R. 631). That the more than $30,000 expended by the Union in relief for the strikers was not adequate is indicated by the fact that some strikers had to abandon the picket line which the Union was maintaining because of lack of food (R. 617). Petitioner Anderson had arranged a conference, in order to discuss the settlement of the strike, with Dr. John R. Steelman, Director of the Conciliation Service, United States Department of Labor, on April 8, 1940, before the last two dynamitings (R. 615), and negotiations for settlement of the strike were in progress at the time the petitioners were arrested (R. 630).

With this background in mind, we turn now to the evidence as to the direct circumstances under which the six confessions were made. Some of this evidence is in sharp conflict, with the Special Agents of the F.B.I. contradicting the evidence given by the petitioners. For this reason, the testimony on this issue given by each of the six petitioners who confessed is summarized separately in some detail, and this is followed, first, by a summary of the testimony given by the Special Agents and others contradicting the petitioners, and second, by a summary of the testimony given by the Special Agents and others corroborating, supporting, or not denying the testimony of the petitioners.

Each of the eight Special Agents participated in the questioning of the petitioners to a greater or lesser degree (R. 274-441).

A. THE PETITIONERS' TESTIMONY CONCERNING THE CIRCUMSTANCES UNDER WHICH THE CONFESSIONS WERE MADE.

Hubbard: He testified that he was arrested without warrant on Wednesday evening, April 24, by Chief Deputy Sheriff Campbell and another deputy sheriff and that they took him to the Y.M.C.A. (hereafter called the Y.) and then to the County Jail (R. 200-201). He was questioned

the next morning for about three or four hours by Special Agents, the only one he could name being Roach (R. 201-202). He slept that night "in the same room occupied by a bunch of company guards", and although there was "a lot of noise going on all the time", he slept "some" (R. 202). He was next questioned the following morning, Friday, April 26, for about two hours and then he was taken back to the Y. (R. 202-203). He was questioned there the same afternoon for "two or three or four hours" and then was taken to the City Jail (R. 203).

Hubbard testified that he spent that night in a cell about seven by nine with three other prisoners, that one of these was a "drunk", that the bunks in the cell were not large enough for two men, and that he slept on the floor (R. 203-204). He might have had a blanket and there was also heat in the jail (R. 203-204).

The next morning, April 27, at about 9 o'clock, some deputy sheriffs took him back to the Y. Hubbard testified that "I was questioned continuously from the time I went there until 4:30 or 5 in the afternoon" (R. 204). The questioning was done by more than one Agent. "Two would come in and stay an hour or hour and a half and they would go out and two others would come in" (R. 204). During the questioning he was seated in a straight back chair at the side of a table, and "I was pushed up straight when I would lean towards the table" (R. 204-205). One of the Special Agents, whom he was unable to name, took away his glasses, which he must wear all the time (R. 204-205). He became "awfully sick" in the late afternoon, but a doctor failed to come until after dark even though he had asked for one about noon; "I think they gave me an aspirin and told me I didn't need a doctor" (R. 205). During the course of this examination, he was called a "damn liar" continuously and the Agents kept telling him they knew the truth (R. 205-206).

Hubbard testified that he could not drink the coffee at the City Jail; there seemed to be something wrong with

it, and he had a headache "almost from the second day on" (R. 206). He did not get anything to eat the night he slept at the City Jail and the next morning he got "two dry sandwiches of some meat, bologna" (R. 207). On Saturday, when he was questioned all day, he had no lunch but "I don't believe I asked for anything to eat" (R. 207). He asked for water and failed to get some until he became ill (R. 207); he started to roll a cigarette several times but "they wouldn't let me roll it" (R. 207). Hubbard also testified that all during this examination he was told that if he would talk he would get a "nice meal" and a drink of water; that "they would go and ask the Judge to be light on me"; that bond would be set at $1,000 (R. 207-208).

At some time during the questioning of Hubbard, he asked for a lawyer; but Special Agent Plaxico said there were no charges against him and he did not need a lawyer (R. 208). His family did not know where he was and he saw no one from the outside from the time he was taken into custody on April 24 until he was arraigned on April 30 (R. 208-209), except Dr. Hyde, who attended him on April 27.

Hubbard also testified that during the course of these various questionings at the Y., the deputies who were quartered there were continuously circulating around the building and that when the door was open they would look in and laugh and sneer (R. 209).

Hubbard claimed that during the period of his questioning he lost about twenty pounds in weight (R. 209).

On cross-examination, Hubbard was able to identify most of the Agents who participated in the incidents to which he had testified on direct examination (R. 210-213). He admitted that he had asked to spend the night at the City Jail instead of at the Y. (R. 215), but on redirect examination he explained that he preferred the disagreeableness of the City Jail to being quartered with his enemies, the deputy sheriffs who had for months been intimidating and interfering with the strikers (R. 216).

Simonds: Simonds testified that he was arrested by Chief Deputy Campbell and another deputy sheriff on Wednesday, April 24, at about 3 o'clock in the afternoon and was taken to the Y. (R. 324). "There were a lot of guards there and deputy sheriffs and F.B.I. agents, they said" (R. 224). He was questioned by Mann and another Agent for about an hour and three-quarters that afternoon and spent the night in the City Jail (R. 224-225). Felton Woodward "and maybe someone else" was in the cell (R. 225). The cell was about seven by nine and had only two bunks; part of the time he slept in a bunk, the rest of the time "I set up in a chair and leaned back" (R. 225). He got nothing to eat the first night and a cold sausage or bologna sandwich in the morning (R. 225-226). The coffee was satisfactory for the first three meals but thereafter he could not drink it (R. 226).

Simonds went on to testify that on the first day, after he had been taken to the City Jail, he was then taken back to the Y. at about 7 o'clock and again questioned "two hours or more" before he was put in the Jail again (R. 226). The next day he was questioned on two occasions, once some time during the day and the other time "close to midnight", on both occasions for about the same time—"from one to two hours" (R. 227); after the first occasion, he was taken back to the Jail and was awakened to be taken back to the Y. for the second questioning (R. 227). He had a bologna sandwich both for lunch and supper (R. 227).

The next morning, April 26, he had another bologna sandwich for breakfast and about half the coffee which was served to him; he could not drink the rest, it had "a sickening taste", it made him sick (R. 228). He was questioned again that day for an hour or more (R. 229).

On the "second day"—which would be April 25—he asked for a lawyer, and Special Agent Roach said, "You got awful damned smart since you have spent one night in jail" (R. 229-230). This was after the Agents had told him it was his "last chance", that "they would not be back any more, and it would be too bad for me" (R. 229). He saw no one

except the F.B.I. Agents and the deputies from April 24, when he was arrested, until April 30, when he was arraigned (R. 230).

Simonds testified that there were a "good many" company guards in the Y. while he was being questioned; when the door was open, they would look in as they passed and laugh; "they usually had short guns" (R. 230).

Simonds also testified that promises were made to him; Special Agent Plaxico "did most of that" (R. 230); Plaxico "said he had a lot of influence with the Judge down at Chattanooga, and if I would come along and make a statement probably he could get me out for six months, it might be a year, and he might get me out on parole and I wouldn't have to serve any time" (R. 230-231). Plaxico also said that "if I didn't make a statement I would get fifteen years, he said the limit was thirty-five years on my case" (R. 231). Plaxico also said that he might get him out on a $1,000 bond (R. 231).

Simonds claimed that he was often called "a damn liar", and that "one time Mann was standing in front of me, he walked up close to my face, slung his hand back and said, 'you are a God damn lying son-of-a-bitch' "—showing his holster with the gesture (R. 231). The Agents "often" told him they knew the truth, would say "we don't want to hear that any more", and would say, "—you are going to talk" (R. 231-232).

Simonds testified that he weighed 191 pounds before his arrest and about 152 or 155 pounds at the time of his arraignment (R. 232).

On cross-examination, Simonds testified that Special Agents Mann and Roach questioned him on both occasions on April 24, the first day of his arrest (R. 234-235). On the first occasion, Sheriff Biggs came in before the questioning was finished "and cut me off pretty short" (R. 235). On this same occasion, the Agents said "they had the goods on me" (R. 235). "They said to me that I was not telling the truth" (R. 235).

Simonds also testified that when he was questioned the evening of the second day, April 25, it was "around 9 or 10 o'clock" and not "close to midnight" (R. 236-237). On cross-examination, Simonds also named the Agents involved in the incidents he had testified to on direct examination (R. 237-240).

Woodward: Woodward testified that he was arrested about noon on Wednesday, April 24, without warrant by Chief Deputy Campbell and another deputy who told him that it was not an arrest; they just wanted to take him and talk to him "a little bit" and be right back (R. 247). He was taken to the Y. for about three or four hours, and, without being questioned, to the City Jail (R. 247-248). He was not sure whether Hubbard was there, but he believed Simonds was (R. 248). He had nothing to eat that night (R. 248).

The next day, Woodward got a cold bologna sandwich and coffee for breakfast, two bologna sandwiches for lunch, and stayed in the Jail until Chief Deputy Campbell or one of the guards took him to the Y. at about 8 or 9 o'clock in the evening (R. 248-249). Without having anything to eat that night, he was questioned by Mann, another Special Agent, and Sheriff Biggs for three or four hours (R. 248-249)—until "around midnight" (R. 250).

That night, April 25, Woodward stayed in the Jail with three others and he "didn't do much sleeping" because there were only two cots (R. 250). The next morning he had a bologna sandwich for breakfast, and coffee which made him nervous and gave him a headache (R. 250-251). That afternoon, April 26, he was taken to the Y. for three or four hours of questioning by Roach and another Agent, which finished about 11 o'clock (R. 251-252). He was in the Jail again that night with three others and slept "just off and on" (R. 252). The next morning he had bologna again and stayed in the Jail until he was questioned again that night (R. 252). The following day, Sunday, the 28th, he spent in the Jail with nothing to eat (R. 252-253). He

signed the confession on Monday, April 29, at 11 or 12 o'clock at night (R. 253).

Woodward testified that Special Agent Mann cursed him (R. 253-254), and also called him "a God damn liar and son of a bitch" (R. 254). The Agents kept telling him they knew the truth, and that "they had come in there to break that strike—that they intended to break it before they left" (R. 254).

On cross-examination, Woodward reiterated that the Agents had said that they were going to break the strike, and that "we are not after you, we are after Mr. Anderson" (R. 255). He also identified the Agents involved in the incidents he had related on direct examination, and Plaxico as the Agent who had said they were in to break the strike (R. 258-259); he further identified Agent Morgan as having said "they had a place in Atlanta that would make me talk" (R. 260).

On redirect, Woodward testified that his bond had been fixed at $1,000, and that on Sunday night, April 28 (he signed his statement on April 29), Agent Plaxico had said he would fix the bond at $500 or $1,000 (R. 260-261). He also testified that Plaxico had promised to take care of a local felonious assault case in which he was involved (R. 263).

Queen: Queen testified that he was taken into custody by two deputies on Sunday afternoon, April 28; the deputies had no warrant, told him the F.B.I. wanted to talk to him, and took him to the Y. (R. 681-682). At the time, he and his wife were discussing the question of getting a doctor for their baby, who was in a very serious condition with bronchial pneumonia (R. 682). There were deputies and "some strange men" at the Y. (R. 682). He spent that night in the City Jail; he and Rhodes were put in the same cell at the same time, and Hubbard, Woodward, and Simonds were put in later (R. 682). There was sleeping space for two only, so "I didn't sleep any Sunday night"; two of the men were on the two cots, one on a

chair, the other two on the floor (R. 682). He had no discussion with Hubbard, Woodward, and Simonds "about getting our stories together" (R. 682). Queen had nothing to eat that night (R. 682-683).

Queen was questioned by Agents Mann and McCabe [3] on Monday evening at about eight or eight-thirty and he "did sign some kind of paper" (R. 682-683). "I didn't know what was in the paper, and didn't get the agents to read it. I signed the paper because the F.B.I. men, Mr. Mann and Mr. McCabe was there and after they got through talking with me they got up and turned their backs and McCabe wheeled around and said sign this right here. I guess you are in a hurry to get back to your wife and baby. He said, 'I guess you are in a hurry to get back to your wife and baby' and I did want to get back to them. I hadn't heard from her during the time I had been down there and didn't know whether she got a doctor for the baby or not" (R. 683). He pleaded guilty because Mann had told him that if he did he would be released and could go back home (R. 683).

Rhodes: Rhodes testified that he had lost weight since taken into custody (R. 733). He was arrested on Sunday, April 28, at about 8 o'clock in the evening by Chief Deputy Campbell and was taken to the Y. for about ten minutes before he was taken to the City Jail (R. 734). He spent the night in the same cell with Queen, Hubbard, Simonds, and Woodward; two slept on the cots, the other three on the floor (R. 734).

At about 10 o'clock on Monday morning, the 29th, a deputy took him to the Y. where he was questioned by Agents Whitten and Lunsford for an hour and a half or two hours (R. 734). Whitten took the statement on a typewriter (R. 734). (On cross-examination, Rhodes said that it was Lunsford who was at the typewriter [R. 739].)

[3] The written confession itself, however, shows that Hevron was also present (R. 518, 521).

Rhodes told them he was innocent, they said they knew everything, and when he continued to protest his innocence Lunsford called him a "damn liar" (R. 734). He testified that he had not told the Agents many things which were contained in the confession; that in fact he had denied them and the Agents kept insisting that he was lying (R. 734-736); "I imagine I was called a liar fifteen or twenty times or maybe more than that" (R. 736). After an hour and a half or two hours "Mr. Lunsford got the paper out of the typewriter and brought it over to me and told me to sign it". Rhodes stated:

> "The best I remember he told me sign this and they would take care of me and said they didn't have me charged with anything, and said he had the story that I was implicated in the dynamiting and they told me to sign that and they would see that I got out of it, it wouldn't cost me anything and I would be turned loose. They said I probably would have to come to Chattanooga in the next day or two and said they would see some official, but I don't remember who the official was, but they told me one or the other, to plead guilty and that the official would take care of me, would see that I was taken care of. They told me to plead guilty when I got before this official, whoever he was, and they said they would call the official before we got down there, or would be down there at the time and would arrange for a small bond and anybody could sign the bond. He said there were two classes of defendants, and if I didn't plead guilty I would be classed with Anderson, I would be in Anderson's class and sent to the penitentiary for several years. He didn't state how many and he said if I did what he said I would be turned loose and go back to my family" (R. 736-737).

Rhodes testified that he pleaded guilty "because the men said to and I thought I had to" (R. 737).

> "I signed the statement because they told me to sign it, I was in the custody of these men and had been there sometime and couldn't see a lawyer or anybody. Neither Mr. Lunsford or Whitten informed me that I didn't have to do it, they didn't tell me I didn't have

to do the things they told me to do. I was never in court before. They didn't tell me the statement would be used against me in court and I didn't read the statement, was not given an opportunity to read it and nobody read it to me. I do not know what Mr. Lunsford was writing while Mr. Whitten was talking. If Mr. Lunsford had written what I told Mr. Whitten there would not have been anything in that statement that implicated me in any dynamiting" (R. 737-738).

On cross-examination, Rhodes added that during his questioning by Whitten and Lunsford others would come in now and then; Plaxico was one of these (R. 738). He reiterated that he did not know what was in his confession when he signed it (R. 738-739), and again denied that he had made many of the statements contained in it (R. 740-741).

Ballew: Ballew testified that he was taken into custody on Tuesday, April 30, at about three in the afternoon (R. 746). The arrest was made at his cousin's farm in North Carolina (where he was living) by Special Agents Lunsford and Whitten and a deputy sheriff, who forcibly took him into Tennessee (R. 747). When they got into Tenessee, Whitten snapped handcuffs on him and said, "God damn you, you will talk" (R. 747). He was taken to the Y., where Chief Deputy Campbell questioned him, telling him, in the words of Ballew:

"come on Robert, tell them what they want to know, said we have not got anything against you or anybody else, said Anderson is the son-of-a-bitch we want. I wouldn't say any FBI men were present when Roxie Campbell made that statement. He said he was not satisfied with coming in here and getting you boys out of a job, he wants to get you in the penitentiary. I said I don't know anything Roxie and he said don't tell me that, I have been a friend of yours, and I said you never did act as a friend, you even had parties guard us while we slept. That was before I talked to the FBI. They had been guarding us when we slept and

that is what caused me to go to the country and far, we couldn't step out of the house without being arrested and stopped on the highway" (R. 748).

Then Lunsford and Whitten questioned him from about 4 o'clock until 6 and he told them he knew nothing (R. 748). He specifically denied making many of the statements in his confession (R. 749-752). After Lunsford and Whitten talked to him on the afternoon of the 30th, they turned him over to a deputy who took him to the City Jail (R. 752). At about 11:30 o'clock that night he was removed to the Hamilton County Jail at Chattanooga "and stayed in jail all night in first one cell and another * * *" (R. 752). The next morning Whitten and Lunsford came for him and

"they said do you want to go back home and I said I woud like to. They said all right we will go to the court house and you can get ready to go home and they brought me to this building here and took me to one of the rooms in yonder, I wouldn't say which one, and I stayed there and they went out and stayed a while, and said we will be back in a few minutes. I just sat there and Whitten and Lunsford went out of the room a few minutes, I would say, probably five minutes, and came back and had a stack of papers, looked like one of those yellow papers and said they wanted me to go home and said we will release you if you sign your name here. I wouldn't be positive they told me how to sign it, they said sign your name here and you can go home. I knew I was not pleading guilty to anything and didn't know anything and hadn't been in any kind of trouble or anything and I had been there all day and night and there hadn't been any charges against me and they said we will let you go home, said sign this and we will be ready to go and I signed it. They didn't read it to me and I didn't know what was in it or what it contained. They said sign this and held it out to me and as quick as I sign it they started out of the room and the Marshal with two negroes handcuffed came in and got me and handcuffed me with them and took me back to the Hamilton County jail" (R. 752-753).

On cross-examination, Ballew testified that when he asked Lunsford for a warrant the latter said "I am a Federal Officer and he showed me a badge and said let's go, I don't need any warrant" (R. 754). He also stated that

> "nobody cussed me out and I was not abused or threatened and they gave me to understand they wasn't after anyone but Anderson, that he was the man they were after. Whitten and Lunsford both told me that at Copperhill, and I also talked to Roxie Campbell. Whitten and Lunsford were the only agents I talked to and they told me that they were not after me at all, that Anderson was the damn man they wanted and they didn't say Mr. Anderson. They didn't cuss me" (R. 758).

He again denied making many of the specific statements contained in his confession (R. 761). He thought that he was signing "some kind of order I had to sign to get my release" (R. 761).

B. Testimony of the special agents and others contradicting testimony of the petitioners.

The Agents testified that several of the petitioners said that they had been treated "very well and had very good food" (R. 188; see also R. 189, 196, 292). They also testified that they did not call the men "liar" or "damn liar" in so many words (R. 186, 276-277, 278, 282, 292, 295, 299, 349, 360, 372, 389, 801, 809). The Agents also denied that they had cursed the petitioners or had used profanity in questioning them (R. 276, 280-281, 299, 324-325, 346, 360, 372, 386, 820); and that they had engaged in intimidation or violence or threats of physical violence (R. 277, 280-281, 292, 324, 325, 346, 360, 369, 371, 386, 388, 390); or that they had made promises or threats concerning size of bonds, length of sentences, parole, or other pains or rewards (R. 176-177, 274, 277, 280, 281, 287, 290-291, 295-296, 317, 327, 330, 337, 347, 359, 361, 369, 371-372, 373, 386, 388, 390, 396, 518, 523, 524, 801, 809-810, 821). Sheriff Biggs and four

of his deputies testified that the prisoners had the same meals at the Y. and at the Jail, as the deputies, and that when they slept at the Y. they slept in the beds the deputies had been using (R. 554, 567, 568, 569, 570). This evidence served to contradict similar testimony of some or all of the petitioners.

As to Hubbard specifically, it was testified that he wore his glasses during questioning and that they were not taken away from him (R. 183, 299, 324, 346, 359, 368, 387); that he was permitted to smoke (R. 299, 324, 325, 345-346, 359-360, 369, 385); that he was not denied water (R. 325, 360, 368, 385);[4] that after he had asked for a lawyer he immediately changed his mind because, he said, he had done no wrong (R. 346-347, 352). With respect to Hubbard's illness on Saturday, April 27, and his failure to get a doctor for many hours after he had asked for one (R. 205), the Agents testified that they gave him an aspirin for a headache after he rejected their offer to call a doctor (R. 370-371, 392-393).

As to Simonds, who had testified that when he asked for a lawyer on Thursday, April 25, Special Agent Roach had commented, "you got awful damned smart since you have spent one night in jail" (R. 229, 230), the Agents testified that on no occasion did Simonds ask for a lawyer (R. 175, 290-291, 327, 359, 368, 372, 388), and Roach specifically denied before the jury that Simonds' charge was true (R. 788).

As to Woodward, who had testified that the Agents had said that "they had come in there to break that strike—that they intended to break it before they left" (R. 254) and that they were not interested in him but in M. C. Anderson (R. 255), the Agents testified that they made no state-

[4] It is interesting to note that none of the four Agents who testified on this point specifically said that Hubbard did in fact have water. Mann said that he did not remember Hubbard asking for water (R. 325); Lunsford answered "No" to the question, "Mr. Lunsford did you ever deprive this man of water?" (R. 360); Whitten was asked, "Did you ever deny him drinking water, if he asked for it?" and answered, "No, sir" (R. 368); Morgan answered in the negative when asked, "Did you deny him water?" (R. 385).

ments to him along such lines and that in fact they were not concerned with the strike but with the violation of Federal law (R. 280, 295, 330, 349, 389-390). Agent Mann testified that at the time Woodward made his confession "he was advised of his rights, he was told he didn't have to make a statement and whatever he said would be used against him in court or could be used against him in court" (R. 445).

As to Queen specifically, the Agents testified that Queen was told that he did not have to make a statement unless he wanted to but that he was in fact anxious to make a statement (R. 517-518, 523), and that he was not told that if he signed, he could get home to his sick baby (R. 794, 820-821).

As to Ballew specifically, Agents Lunsford and Whitten testified that Ballew was not arrested when they and a deputy found him in North Carolina and taken by force into Tennessee, but that he went along with them of his own free will (R. 801-802, 810-811); that they felt it would be more satisfactory to interview him in Copperhill instead of at his cousin's farm in Tennessee (R. 805, 814-815); that they did not put handcuffs on Ballew (R. 802, 811) and say to him, "now, damn you, you will talk" (R. 802); that he was not told they were after M. C. Anderson and not him (R. 813); that Ballew apparently did not mind staying in Copperhill (R. 806-807, 817), even though the Agents offered to take him home (R. 539); that he was not told that he could go home if he signed the statement (R. 803); that he was not told he was signing a release (R. 803); and that he read his statement before he signed it (R. 813).

As to Rhodes specifically, Agent Lunsford testified that Rhodes was told he did not have to give the statement unless he wanted to and that the statement would be used against him (R. 524).

C. TESTIMONY OF THE SPECIAL AGENTS AND OTHERS CORROBORATING, SUPPORTING, OR NOT DENYING TESTIMONY OF THE PETITIONERS.

This testimony falls into several different categories. Each will be treated separately.

1. *Illegal arrests and detention without arraignment.*

Only the merest pretense was made by the Agents in their testimony that the six petitioners who confessed were legally arrested. This pretense is illustrated by Roach's testimony that, "As I understand it, the Sheriff of Polk County arrested him (Simonds) on a charge of the State—arrested quite a few of them, and asked us to interview them in reference to various dynamiting (sic)" (R. 172-173). It is also illustrated by the testimony of Plaxico, Special Agent in Charge (R. 316, 320), that Sheriff Biggs had told him that "he had some kind of local charge against them" (R. 304). Even though Plaxico did not order the men arrested and even though Plaxico insisted they were in the custody of the Sheriff (R. 304), Plaxico always found the men available for questioning when he wanted them and was apparently satisfied they would continue to be available; after he questioned men at the Y. (R. 304-305) he "left them right there" (R. 305). In fact, whatever the Agents wanted done about the men Sheriff Biggs did (see e.g., R. 196).

Sheriff Biggs testified that it was he who ordered the arrests of all of the twenty-one original defendants on "State charges" (R. 540, 542). He had no warrants for the six confessing petitioners (R. 546). Although he had secured a mittimus to hold them for investigation, he knew that the men could not be held "on a warrant or anything else more than seventy-two hours" without a preliminary hearing (R. 549-550).

Although some effort was made by the Agents to convince the jury that Ballew came with them voluntarily from North Carolina into Tennessee (R. 801-802, 810-817),

and remained voluntarily at the Y, after the questioning on April 30 (R. 816-817), this is inconsistent with the Sheriff's testimony that he ordered Ballew arrested (R. 542). In fact, Agent Whitten testified that he, Lunsford, and the deputy sheriff who was with them (R. 810) had no charges or warrant against Ballew and went to North Carolina to question him, not to arrest him (R. 814): Mrs. Edna Carter, Ballew's cousin at whose house in North Carolina he was picked up, supported his testimony about the forcible arrest (R. 764-768).

The arrests of all six petitioners who confessed were therefore illegal. As to detention without arraignment, it is not denied that Hubbard, Simonds, and Woodward were held from Wednesday, April 24, until arraignment before a United States Commissioner on Tuesday, April 30 (Government's Memorandum on the Petition for a Writ of Certiorari, 31) and that this was illegal (id., 32).

2. *Lengthy and persistent questioning.*

Even if we accept the testimony of the Agents at face value, and even allowing for the difficulty of remembering precise dates and exact length of each period of questioning (this testimony coincides closely with that given by the petitioners), it is clear that Hubbard, Simonds, and Woodward at least were subjected to frequent and lengthy periods of questioning on the five days from their arrest on Wednesday, April 24, until they confessed verbally on Sunday, April 28.

Hubbard was questioned for two hours on the afternoon of April 25 by Special Agents Roach, Plaxico, Mann, and Hevron (R. 181, 296-297, 309, 322-323, 345, 351). Plaxico testified that he was "positive" that Sheriff Biggs "sat in there for a while" (R. 309). Hubbard was again questioned that evening by Roach and Plaxico for two hours (R. 174-175) or perhaps from one and a half to two hours (R. 282-283).

On April 26, Special Agents Morgan and McCabe interrogated Hubbard on and off for five, ten, or fifteen minutes at a time from about five to six-thirty in the afternoon (R. 384, 391). About an hour later, from seven-thirty to nine-thirty, Hubbard was again questioned, this time by Special Agents Lunsford and Whitten (R. 358-359, 362-363, 367, 374-376).

Hubbard testified that it was on Saturday, April 27, that he was questioned continuously for most of the day (R. 204). The testimony of the Special Agents, while leaving some gaps, supports Hubbard's claim. Thus Plaxico testified that he questioned Hubbard for about half an hour at about 11 o'clock that morning (R. 313). Roach testified that he and Plaxico questioned Hubbard at about 2 or 3 o'clock in the afternoon, for what period he did not say (R. 182). Plaxico further testified that he interrogated Hubbard again at about 6 o'clock for about fifteen or twenty minutes (R. 314). The testimony of Special Agent Morgan about the questioning of Hubbard on April 27 is particularly interesting. He stated that he started to talk to Hubbard at the Y, "around two, it was in the morning, I believe"; that he talked to him then for ten or fifteen minutes, or more; that he left and then returned. He had difficulty in saying how many times he talked to him, it may have been two or three times—"We talked to so many people it is difficult to say"; however, when he was asked whether he talked to Hubbard all day, his answer was, "Intermittently, I would say, yes"; the last time was late in the afternoon (R. 392). Morgan was not sure whether Special Agent McCabe was with him when he questioned Hubbard on April 27 (R. 385, 393).

On Sunday, April 28, Hubbard was present while Roach and Plaxico questioned Simonds for about forty-five minutes to an hour, at the end of which time Simonds confessed (R. 274-275). Thereupon Hubbard also made an oral confession (R. 275). Agent Mann came in later and asked one or two questions (R. 323). The questioning of

Simonds and Hubbard—and Woodward, who came in later—lasted from about five o'clock until seven thirty or forty-five (R. 285), or perhaps until eight or nine (R. 188). Biggs and some of his deputies were also present at some time during the period (R. 196). Hubbard's statement was reduced to writing as he retold his story on April 30 in about an hour and a half or two hours (R. 364-365); it was taken by Agents Hunsford and Whitten (R. 364-365, 374-379, 501).

Thus, in Hubbard's case it appears from the testimony of the Special Agents themselves that he was questioned on four consecutive days. On April 25 he was questioned for about four hours during two different periods, one in the evening, for a total of about three and a half hours. On April 27 he *was* subjected to questioning for most of the day—on and off throughout the day by Agent Morgan, probably accompanied by Agent McCabe; at about 11 o'clock for about half an hour by Plaxico; at 2 or 3 o'clock by Roach and Plaxico; and by Plaxico at about 6 o'clock. On April 28 he was questioned part of the period of two and a half or two and three-quarter hours with Simonds present at first and Woodward later, and with two of the Agents present at first and a third later.

In evaluating this testimony, and the testimony of the Special Agents concerning the other petitioners, Special Agent Roach's statement concerning the practice of returning to the same prisoner during the same day should be borne in mind:

> "We may have interviewed Ed Simonds or Earl Hubbard, or any individual, for a couple of hours, in the morning, and then in the afternoon some one else might have been talking to another man and got some information in reference to Simonds and Hubbard and then we would go in and interview Hubbard or Simonds and find out what they said" (R. 186).

And that more than one Agent questioned the same prisoner at the same time is indicated not only by the testimony con-

cerning specific interviews, but also by Special Agent Morgan's comment, "We usually work two together" (R. 393).

On Thursday, April 25, according to the testimony of the Agents, Simonds was interrogated by Plaxico for an hour or a little longer in the morning (R. 315). Roach, Plaxico, and Mann then questioned him for two hours from 2 to 4 o'clock in the afternoon and for two more hours that evening, from about 7 to 9 o'clock (R. 172, 173-174, 279, 289, 311, 326, 336). On April 26, he was questioned by the same trio for about an hour in the morning (R. 311-312). On Saturday, April 27, Simonds was questioned by Plaxico for a short time in the afternoon (R. 315), and by Morgan for about twenty-five or thirty minutes late in the afternoon (R. 387). On Sunday, April 28, he was questioned by Roach and Plaxico for about an hour before he confessed (R. 274-275, 289). As set forth above, pp. 23-24, the questioning of Simonds and Hubbard—and Woodward, who came in later—took about two and a half or two and three-quarter hours (R. 285), or perhaps longer (R. 188).

That other Agents questioned Simonds and that there was at least one other occasion on which he was questioned is indicated by the testimony of Agents Roach and Whitten. Roach testified that Simonds was "probably" questioned by other Agents in addition to Mann, Plaxico, and himself—although he refused to state definitely that he was questioned by other Agents (R. 286). Morgan questioned him (R. 387), and Whitten also testified that he questioned Simonds when the latter was present during the interrogation of Ballew (R. 367, 372). However, the length of time and other details concerning this further questioning are not indicated in the record.

In Simonds' case, therefore, it also appears from the testimony of the Special Agents that the questioning was excessive. On April 25 he was questioned for three different periods—morning, afternoon and evening—for a total of five hours or longer, with one Agent doing the question-

ing alone in the morning and with three Agents conducting the examinations in the afternoon and evening. The same three Agents questioned him for about an hour the next day, and one of them for a short period the day after that, April 27. On April 27, also, a fourth Agent questioned Simonds. On Sunday, April 28, he was interrogated for about an hour before he confessed and for some time thereafter. He was questioned by at least one other Agent on at least one further occasion.

Turning to Woodward, he was also questioned by Roach on April 25 for two hours in the afternoon and for two hours in the evening (R. 187, 279, 436). Hevron testified that he questioned Woodward for an hour and a half on that day, and that Mann was present, but Hevron did not fix the time of day (R. 348). Mann also testified that he questioned Woodward for an hour and a half on that day but he neither fixed the time nor said who was with him (R. 328). Although Roach testified that Mann questioned Woodward with him on the 25th (R. 279) (without making clear whether on one or both of the occasions on which Woodward was questioned that day), we think it is fair to conclude from the incomplete testimony of Roach, Mann and Hevron that Woodward was questioned by Mann and Hevron on April 25 on an occasion distinct from the two on which Roach questioned him. This conclusion seems justified from the coincidence in the testimony of Mann and Hevron that the questioning by them lasted an hour and a half, as distinct from Roach's statements that the questioning lasted two hours on both occasions in which he participated. This conclusion is also more consistent with Woodward's testimony (R. 255).

Agent Morgan also testified that he questioned Woodward on two occasions, one of them being on April 27 (R. 388-389, 397). The questioning lasted ten or fifteen minutes the first time, with "several agents" present; and a little longer the second time, with Roach and Plaxico probably present (R. 389). Plaxico also testified that he questioned Woodward on about two or three occasions, but

he could not remember the dates; however, the questioning by him never lasted over half an hour (R. 294).

Plaxico did not make clear whether the two or three occasions included the occasion on Sunday, April 28, when Simonds signed his written statement and Hubbard and Woodward confessed orally (R. 293-294). As set forth above, pp. 23-24, Woodward was brought in on April 28 after Simonds and Hubbard had made oral confessions (R. 187-188, 194-195, 274-276, 293-294, 328). The questioning of all three men took from about two and a half to two and three-quarter hours, or perhaps longer (R. 188, 285). Roach and Plaxico started the questioning (R. 274-275, 293, 297), and Mann joined the group later (R. 323, 328). Woodward's written statement was taken the next day, the 29th, by McCabe, Hevron and Mann (R. 187, 294, 328-329, 445). Mann testified that Woodward

> "had considerable difficulty in recalling the details, he said his mind was not exactly clear on all of it, it took a good while in order to get the details of it, of how it happened, everything in the chronological order of events, and he also complained on occasions that his mind was befuddled in making the statement, upon relating about what he had done, and that is the reason it took so long to do it. It took the morning and the greater part of the afternoon" (R. 329).

He also stated that Woodward

> "would state facts and then want to change them and rather than want to change it or erase it I indulged him a long period of time and waited. Sometimes he would sit five minutes meditating over what we asked him" (R. 343).

To sum up on the questioning of Woodward, he was interrogated for two sessions of two hours each on April 25, and probably during a third session lasting an hour and a half. He was questioned again on April 27, and on April 28 when he confessed. There were also at least two additional occasions, dates not specified, on which Agents Mann and Plaxico, separately, interrogated him.

Coming to Queen, Rhodes and Ballew, there is no significant discrepancy between their testimony relative to the times and periods of their questioning, and the testimony of the respective Agents who questioned them—Mann (R. 517-522, 820) and McCabe (R. 523, 794) in Queen's case; Lunsford (R. 524-526, 801) and Whitten (R. 809-810) in Rhodes' case, and in Ballew's case (Lunsford R. 526-533, 801-808; Whitten, R. 810-817). Queen was questioned and made his statement on Monday evening, April 29, the day after he was arrested; the period of questioning lasted from 9 to 10 o'clock, according to Mann (R. 522), but according to Queen, started at about eight or eight-thirty (R. 682-683). Rhodes, according to his testimony, was questioned an hour and a half or two hours on Monday morning, the 29th, the day after he was arrested (R. 734); the Agents did not testify as to the length of the questioning. Ballew was questioned for two hours at the Y. in Copperhill by the two Agents on April 30, the day he was arrested (R. 748), and in the Federal Building in Chattanooga on May 1, when he confessed (R. 526-533, 752-753, 801-808, 810-817).

3. *Failure of men to see lawyers, friends or relatives, before arraignment.*

The Government specifically admits that Hubbard, Simonds and Woodward saw no one "from the outside" from the time of their arrest on April 24 until after their arraignment on April 30 (Government's Memorandum on the Petition for a Writ of Certiorari, 32). No claim is made that Queen, Rhodes and Ballew saw anyone from the outside during the period from their arrest until their arraignment. Queen and Rhodes were arrested on April 28, and confessed on April 29; Ballew was arrested on April 30, and confessed on May 1. It is not clear from the record when these men were arraigned.

There is no evidence that any of the prisoners saw or could see anyone from the outside before they confessed.

There is in fact positive evidence that no one could see them. Sid Howell, Woodward's father-in-law, testified that on Thursday, April 25, the day after Woodward was arrested, he went to the Y. in Copperhill to see him but was told by two deputies whom he named that they had orders "from the F.B.I. men for no one to see him" (R. 642), and that when he tried again on Friday, Deputy Sheriff Brock said "that they had him under arrest and that no one was allowed to see him at all, that they was questioning him * * *" (R. 642-643). On Saturday, however, he talked to some of the prisoners, including Woodward, through a peep-hole, but he could not see any of them (R. 643). Sheriff Biggs admitted that he refused to permit "one or two men that kept coming there" to see the men (R. 554), and that "I tried my best to keep outsiders that was not interested out" (R. 554). Although he said, "I didn't refuse to let Sid Howell see Felton Woodward", he also stated that "he possibly was not allowed to see him while he was being talked to by me or some of my officers" (R. 555). Chief Deputy Campbell admitted that he refused to permit Townsend and Hunt, counsel for the men, to see them in Copperhill two or three days before they were taken to Chattanooga (R. 271-272); he said that he "would rather they would see the Sheriff" (R. 271). The record is barren as to whether or not they saw the sheriff. And although Special Agent Roach claimed that he sent for Mrs. Simonds on Sunday, April 28, he admitted that this was after Simonds had made his statement on that day (R. 178-179).

The testimony of E. B. Baker, Robert C. Hunt and J. M. C. Townsend, counsel for the men, that they and relatives of the men had difficulty in securing access to the prisoners for some days after the original arraignment on April 30 (R. 643-646, 768-772, 772-774) was not seriously disputed by the Government. Baker testified that he was unable to see all the prisoners together until May 6, the day of the preliminary hearing (R. 645-646). Dodson, the jailer, at

the Hamilton County Jail in Chattanooga, testified that when the men were brought in on April 30 he was given orders not to let them see anyone, but to permit the lawyers to see them one at a time (R. 266); after two or three days, he was ordered to permit immediate relatives to see the prisoners (R. 266).

Baker's testimony that he had difficulty in seeing the men at the arraignment was supported by that of United States Commissioner James H. Anderson, who committed the men. Anderson testified that he had seen Baker outside of the room, and when the Sheriff of Hamilton County announced that nobody could come in except the prisoners and the officers, he, Anderson, stated that the prisoners were entitled to counsel and directed that Baker be admitted (R. 219).

This summary does not, of course, include the specific testimony from the petitioners that their requests to see a lawyer were denied, since this testimony was controverted by the Agents.

4. *Inducements in the form of low bail bonds and parole.*

As set forth above, the petitioners testified that various rewards and inducements were held out to them if they confessed. The Agents denied that they had made any promises or inducements.

Among other things, the petitioners claimed that offers of favorable treatment in the shape of low bail bonds were made to them. Thus, Hubbard testified that the Agents promised that bond would be set at $1,000 (R. 208); Simonds testified that Special Agent in Charge Plaxico promised to get him a $1,000 bond and that Chief Deputy Sheriff Roxie Compbell brought a bond for that amount to Mrs. Simonds to be signed (R. 231); and Woodward testified that Plaxico promised to secure a bond for him in the amount of $500 or $1,000 (R. 260-261).

The petitioners' testimony with reference to the bonds was supported by an important witness, United States

Commissioner Anderson, who committed the prisoners (R. 217). Anderson testified that at the arraignment Special Agent Mann requested that bond be fixed at $3,000 in some of the cases, and at $1,000 in others (R. 217-218); he did not remember in which cases Mann asked for $1,000 bonds (R. 217-218). Anderson disregarded Mann's recommendation at the arraignment, but his records, which he had with him on the witness stand, showed the following notation for May 3, 1940:

> "May 3, 1940, Clyde Hoffman, brought before me by Marshal Ricketts, and at the request of Mr. Mann, Agent, the bond of Felton Woodward was reduced from $3,000 to $1,000 and on this date said Woodward executed bond for $1,000 for appearance before me on May 6, 1940, with Ben F. Presswood of Ducktown, Tennessee, as surety" (R. 218).

Anderson thought that Plaxico was present at the arraignment when Mann made his recommendation (R. 221).

It is true that Mann denied that he had made any recommendations about bonds (R. 338). However, Commissioner Anderson's written and contemporaneous record would seem to be conclusive; and if none of the Agents made any recommendations on the size of the bonds, there is nothing in the record, in Anderson's testimony or elsewhere, to explain why Woodward's bond was fixed at $1,000 instead of at $3,000 or more as in the other cases (R. 218).

Commissioner Anderson's testimony is corroborated by that of E. B. Baker, counsel for the defendants. Baker testified that he saw Agent Mann in the hearing room and that

> "he had a little book in his hand and had the names of all the defendants written on a book and he got this book out and recommended to Commissioner Anderson that all the defendants with the exception of five be placed under $3,000 bonds and the others under $1,000 bonds. Felton Woodward and Ed Simonds were two of the men that he wanted placed under $1,000 bond" (R. 644).

The petitioners also claimed that the Agents made promises to secure parole for them. Simonds testified that Plaxico said

> "he had a lot of influence with the Judge down at Chattanooga, and if I would come along and make a statement probably he could get me out for six months, it might be a year, and he might get me out on parole and I wouldn't have to serve any time" (R. 230-231).

Woodward testified that Plaxico told him that if he made a statement Plaxico "would see I was paroled" (R. 261); and while Hubbard did not say that he was promised parole in so many words, he did claim that the Agents told him that if he made a statement "they would go and ask the Judge to be light on me" (R. 208).

Although the Agents denied that any promises concerning parole had been made to the men, significant corroboration came from Chief Deputy Sheriff Roxie Campbell (R. 272-273). Campbell testified that he heard Plaxico tell Woodward that he would secure a parole for Woodward if he made a statement; that he, Plaxico, would be glad to make such a recommendation to the Court (R. 272). However, Campbell was not sure whether this was before or after Woodward's statement had been taken (R. 272). Campbell also testified that he might have told the men (without specifying which ones) that Plaxico had influence with the Court, "that these Federal men can probably do what they say they can" (R. 272). Plaxico told him, Campbell, that "he would be glad to recommend a parole for the boys that come clean" (R. 272). He repeated this to "four or five in jail that night" (R. 273).

The Government has argued that Campbell's testimony as to what he told the men in custody does not help the petitioners "because it was not shown that he made the statement to any man in custody before the confessions had been signed" (Government's Memorandum on the Petition for a Writ of Certiorari, 35). Since Plaxico's statement was that he would recommend a parole "for the boys

that come clean", and since Campbell repeated the statement that night, necessarily Campbell repeated the statements before the men had "come clean".

Plaxico claimed that he did not "authorize" Campbell to tell Woodward that he, Plaxico, would recommend parole if Woodward made a statement (R. 318). He claimed that the only statement he made to Campbell in connection with leniency for the men was made after the men had confessed, on the morning that the United States Marshal came to Copperhill to take the men into custody (R. 318). At that time Campbell told him

> "he would regard it as a personal favor if Woodward, Earl Hubbard and Ed Simonds, if these men pleaded guilty, if we could do anything for them on account of their families, I told Roxie Campbell at that time it was my experience when a man did enter a plea of guilty, the only thing the investigating officials could do would be to tell the facts, and we are bound to apprize the Commissioner of the facts whether good or bad, I told him that was our duty, that is what we were supposed to do" (R. 318).

Campbell's testimony, however, is too specific to be lightly dismissed.

5. *Intimidating Surroundings.*

This case arose after several hundred men had been on strike for more than nine months (R. 588). In August, 1939—one month after the strike began and eight months before the dynamitings and arrests in April, 1940—Sheriff Biggs and his deputies had established headquarters at the Y.M.C.A. in Copperhill, which belonged to the Company (R. 550-552).

According to Sheriff Biggs, "I established headquarters there to be able to enforce the law and keep out any trouble" (R. 551). According to the strikers, however, the function of Biggs and his deputies resembled more the traditional function of a sheriff and his deputies in the course of a strike in an isolated community. Hubbard

testified that practically all of the deputies were strangers to him, and that for a period of months, at all hours of the day and night, they had intimidated the strikers, searched their houses and cars, "and so on" (R. 216). Ballew claimed that he went to Mrs. Carter's home in North Carolina to live because "we couldn't step out of the house without being arrested and stopped on the highway" (R. 748). Petitioner Anderson, the national representative of the Union (R. 614), claimed that his wife rode around with him for protection (R. 631). Of much greater significance, however, is Anderson's testimony of his persistent efforts to have the Attorney General of the United States and the United States Attorney for the District (who later prosecuted this very case) investigate the violations of Federal law involved in the interference with the rights of the strikers:

> "I had before these dynamitings conferred with J. B. Frazier, United States District Attorney of this District in reference to certain law violations in the Copper Basin. The last conference I had with him as I recall was on April 23, 1940. On that occasion I was trying to get General Frazier to send Federal Bureau of Investigation men into the Copper Basin to investigate these violations of the law. I wanted him to investigate violations of the law against interstate transportation of strike breakers and guards. Prior to that time I had had other correspondence with the Attorney General of the United States and appealed to him for assistance in reference to the same matter, in reference to the violation of the civil rights in the Copper Basin. I received this letter from the office of the Attorney General of the United States in reply to the correspondence and I will file this as Exhibit No. 1" (R. 630-631).

It is important to note that Anderson's last conference with the United States Attorney took place on April 23, 1940. The dynamiting which led to arrests in the case took place that night (R. 128).

The Government made no effort to controvert this testimony of the petitioners about the intimidation during the

course of the strike, and about the efforts of the strikers to secure the protection of the Government.[5]

It was therefore to be expected that when the dynamitings took place only strikers should be suspected and arrested; Special Agent Roach testified that Sheriff Biggs arrested only strikers (R. 194), and that the Agents questioned only the persons in Biggs' custody (R. 191). Roach and Plaxico testified that Biggs attended the organization meeting of the Special Agents when they came on the scene (R. 169-170, 334).

With this background, we come to the situation in which the men found themselves during the periods of questioning by the Special Agents. To begin with, Sheriff Biggs testified that the first place the men were taken to upon their arrest was to the Y.M.C.A., his headquarters (R. 540, 552). Then, when the men were questioned, it was at the Y. (R. 170, 307); as to this, there is no dispute (Government's Memorandum on the Petition for a Writ of Certiorari, 10). The prisoners also ate and slept at the Y., except for those occasions when they ate and slept at the County Jail or at the City Jail (R. 541, 552, 554, 566-570).

Biggs testified that at the time he had 15 to 25 deputies (R. 553), and that they were armed at all times (R. 554). Thus, when the petitioners ate, slept and were being questioned they were constantly surrounded by a large group of armed men whom they had necessarily come to regard as their enemies. Special Agent Mann acknowledged that Biggs was present on most occasions when the men were being questioned (see, also, Roach, R. 196; Plaxico, R. 309).

[5] The poignancy of this testimony is heightened by the uncontradicted evidence concerning the pathetic situation of the strikers and their families. Union minutes showed that men were "quitting picket lines because of not getting enough to eat" (R. 617), and that the strikers were exhorted to "cut wood for something in the line of relief" (R. 617). The leaders tried "to get the school, the Ducktown school, to give those children out there something to eat, instead of a bowl of soup * * *" (R. 624); they wondered "how we were going to take $100 or $200 and divide it amongst 200 or 300 people and their dependents" (R. 627).

6. *Physical Mistreatment.*

When the prisoners did not eat or sleep at the Y., they ate and slept at the County Jail or at the City Jail. In the cases of Hubbard, Simonds and Woodward the Government acknowledges that on two nights each of them was crowded into one small cell at the City Jail with three or more others (Government's Memorandum on the Petition for a Writ of Certiorari, 31).[6]

In fact, the testimony of the petitioners as to conditions at the City Jail is uncontradicted. Hubbard testified that when he spent the night of April 26 in the Jail, there were three others in the cell, one of them an intoxicated person, and that, because there were bunks for two only, he slept on the floor (R. 203-204). (It was on the following day that Hubbard was subjected to his day-long interrogation.) Hubbard and Simonds agreed in their testimony that the cell was about seven by nine (R. 203, 225). Simonds, testifying to conditions in the cell on the night of April 24, said that Woodward "and maybe someone else" was in the cell, and that part of the time he slept in a bunk and the rest of the time, "I set up in a chair and leaned back" (R. 225). Woodward testified that on one of the nights he spent in the Jail, the night of April 25, he did not do much sleeping because there were only two cots for four men (R. 250). Woodward also testified that on the night of April 26, there were three others in the cell and that he slept "just off and on" (R. 252). Queen testified that he spent Sunday night, the 28th, in the same cell with Rhodes, Hubbard, Woodward and Simonds, and that he did not have any sleep; two of the five men slept on the two cots, two on the floor, and one sat in a chair (R. 682). Rhodes' testimony about the night in this cell was similar (R. 734). Queen and Rhodes confessed the next day (R. 522, 524).

[6] In the memorandum, however, the statement is also made that one of the two nights was after they had confessed (33). No record citation is given for the statement, and in fact the testimony of Hubbard that he spent one night in the County Jail (R. 208) and one night, April 26, in the City Jail (R. 203), of Simonds that he spent two nights in the City Jail (R. 225, 227), and of Woodward that he spent three nights in the City Jail (R. 248, 250, 252)—all before the oral confessions on April 27—is not contradicted.

Ballew did not spend a full night at the City Jail. After spending the early part of the evening of April 30 in the Jail, he was removed at about 11:30 to the Hamilton County Jail at Chattanooga, spent from about 12:30 to about 4 a. m. in one cell there, and was then put in another cell (R. 752, 755). He confessed the next morning (R. 526). This testimony was also not contradicted.

The evidence further demonstrates that the petitioners were mistreated in other ways and that they suffered as a consequence. The testimony of four of the six petitioners who confessed that they were given nothing to eat on the first night of their arrest, even though they were arrested during the day, was not controverted (Hubbard, R. 200-201, 207; Simonds, R. 224, 225; Woodward, R. 247-248; Queen, R. 681-682). Dr. H. P. Hyde, who treated Hubbard on April 27, testified that while Hubbard had only an ordinary cold, "he seemed to be depressed and sick" (R. 199). "His condition was depressed and he was nervous—" (R. 566). The testimony of Robert Dale, the bookkeeper at the Hamilton County Jail who registered the prisoners there on April 30, tended to support the testimony of Hubbard, Simonds and Woodward that they lost weight seriously between April 24, when they were arrested, and April 30, when they were committed. Hubbard testified that he lost about 20 pounds, from 185 or 187 to 167 (R. 209); Dale's records showed that Hubbard weighed 169 on April 30 (R. 241). Simonds testified that he went down from 191 pounds to 152 or 155 (R. 232); Dale's records showed that Simonds weighed 165 on April 30 (R. 241).[7] Woodward testified that his normal weight was 165 to 170, that he could not have weighed less than 165 pounds on April 24 (R. 265); Dale's records showed that he weighed 155 on April 30 (R. 241).

7. *Other Corroborative Testimony.*

While the Special Agents testified that they did not call the petitioners "liar", it is obvious from their tes-

[7] Special Agent Roach testified that on April 29, Simonds told him his weight was 170 (R. 278).

timony that they refused to believe what the prisoners were saying—and made that clear to the prisoners—until the men would admit their guilt or give information which coincided with that which the Agents believed to be true. Special Agent Roach testified that after the Agents would check up with Mrs. Simonds on alibis Simonds had given, he would return and tell Simonds that "one was lying, he or his wife" (R. 184); and that when Simonds would make a statement that he, Roach, did not believe, he would say, "Now Ed, it does not fit into the facts we have developed so far—what the others have told us" (R. 185). This testimony coincided with what Simonds claimed—that the Agents would tell him they knew the truth, that when he started to answer the Agents would say, "hush, we don't want to hear that any more" (R. 231-232). The testimony of Hubbard and Woodward also coincided with that of Roach—that the Agents told them they knew the truth (R. 206, 254).

The other Agents gave similar testimony. Plaxico testified that the Agents would keep confronting Simonds with the information they developed and that if Simonds still insisted the information was incorrect, he, Plaxico, would insist upon its validity (R. 291-292, 321-322). Mann told Hubbard "he was not telling the truth" the first time he questioned him (R. 324). He, too, testified that they kept confronting the prisoners with the results of the investigation they made of the prisoners' original stories (R. 328). Mann also testified that when one of the men made a contradictory statement he would tell him that it was not true, that he did not want that kind of proof, and that he, Mann, knew what the truth was. Hevron testified that when he and Mann took Woodward's statement on April 29 they kept refreshing Woodward's recollection with the confidential information which they had (R. 355). Hevron also testified that when Hubbard told him something which did not check with his information, he would say that Hubbard was not telling the truth and that he, Hevron, knew it (R. 356-357). Morgan's testimony was along the same lines.

He would tell the prisoners that he knew the truth, and would reject their statements if they did not coincide (R. 398); he told them that "I would rather not hear it that way * * *" (R. 388, 389). In fact, Morgan admitted that "substantially" he would tell the men that they were lying (R. 399).

Finally, the testimony of two defendants who did not confess as to their treatment by the Agents is generally similar to the testimony given by the six petitioners who did confess. Ben Cross, who was picked up in Georgia on April 28, testified that he was questioned by Lunsford and another agent on April 29 from about 8:00 a. m. until between 3:00 and 4:00 p. m. (R. 242, 243). Lunsford called him "liar", "damn liar" and "son of a bitch" (R. 243). Lunsford told him "they had a perfect right to kill me and leave me in the dark" (R. 244). The Agents would not permit him to go to the bathroom and he wet his clothes (R. 245-246). The trial court directed a verdict of not guilty as to Cross (R. 582).

Petitioner Anderson, who did not confess, testified that Agent Roach kept cursing him and calling him a liar (R. 626), that Plaxico said, "damn you we have ways to make you talk" (R. 626-627).

Questions Presented

1. Whether the confessions of petitioners Hubbard, Simonds, Woodward, Queen, Rhodes, and Ballew were voluntarily made, and were admissible in evidence against them.[9]

---

[8] Two questions presented in the petition for writ of certiorari are not urged here: (1) Whether error was committed in the refusal of the trial judge to admit certain evidence on the examination and cross-examination of witnesses; (2) Whether there was sufficient evidence to support the conviction of petitioners Anderson and Ellis (Petition for Writ of Certiorari, p. 3).

[9] The question of the effect of the erroneous admission of any one of the confessions on the right of the several petitioners to a new trial, which is part of the general question concerning the admissibility of the confessions, is separately numbered here.

2. Whether the erroneous admission of any one of the confessions constituted prejudicial error to the other petitioners.

3. Whether petitioners Queen, Rhodes, and Ballew could be convicted in the absence of any proof, other than their confessions, of their participation in the alleged conspiracy.

ARGUMENT

I

The confessions of petitioners Hubbard, Simonds, Woodward, Queen, Rhodes, and Ballew were involuntarily made, and were not admissible in evidence against them.

A.

This Court said recently that

> "when * * * the question is properly raised as to whether a defendant has been denied the due process of law guaranteed by the Federal Constitution, we cannot be precluded by the verdict of a jury from determining whether the circumstances under which the confession was made were such that its admission in evidence amounts to a denial of due process". (*Ward* v. *Texas*, 86 L. Ed. 1101, 1103.)

There is no dispute that the question is properly raised in this case.

In *Ward's* case, also, this Court summarized the grounds upon which it has set aside convictions in cases of this character:

> "This Court has set aside convictions based upon confessions extorted from ignorant persons who have been subjected to persistent and protracted questioning, or who have been threatened with mob violence, or who have been unlawfully held incommunicado without

advice of friends or counsel, or who have been taken at night to lonely or isolated places for questioning" (id., at 1105).

The Court went on to say that any one of these grounds would be sufficient cause for reversal (id., at 1105-1106).

In *Lisenba* v. *California*, 86 L. Ed. 179, the Court phrased the principles in somewhat similar words:

> "We have not hesitated to set aside convictions based in whole, or in substantial part, upon confessions extorted in graver circumstances. These were secured by protracted and repeated questioning of ignorant and untutored persons in whose minds the power of the officers was greatly magnified; who sensed the adverse sentiment of the community and the danger of mob violence; who had been held incommunicado, without the advice of friends or of counsel; some of whom had been taken by officers at night from the prison into dark and lonely places for questioning" (id., at 190).

Even though there be eliminated from consideration every factual issue on which the evidence is in conflict, we have in this case every ground—or a parallel ground—which the Court has thus stated as justifying a reversal. In addition, here there is inducement, *Bram* v. *United States*, 168 U. S. 532, an issue which the Court in the *Lisenba* case put to one side as having been determined, on conflicting evidence, by the finding below (86 L. Ed. 179, at 190); and here there is physical mistreatment, an issue which the Court held resolved, for the same reason, in the *Lisenba* case (id., at 190) and in the *Ward* case (86 L. Ed. 1101, at 1104).

Taking each issue in the order set forth in the *Ward* case, we come first to "persistent and protracted questioning". In that case, the crime was committed on a Sunday. Without being arrested, the petitioner was questioned the same day with several others and then released. Later that day and on the following day, the petitioner was

questioned several times. He was not actually taken into custody until Tuesday evening, when he was taken to a jail in an adjoining county. The following night, Wednesday, he was taken to another jail in another county. A police officer visited him from time to time, and on Thursday morning delivered him to two highway patrolmen in a third county. The same morning the patrolmen turned him over to the sheriff of still another county. "During this time he had been questioned continuously" (86 L. Ed. 1101, at 1103). After the sheriff to whom he had been finally turned over talked to the petitioner on Thursday, the latter signed a confession.

Although in this recital it is stated that Ward was questioned "continuously" from Tuesday night to Thursday morning, it may be assumed that on the facts such questioning was not continuous in the sense that there was no respite; the fact that Ward was moved about as much as he was indicates this.

On the basis of the facts set forth in the opinion in the *Ward* case, it is impossible to conclude that the questioning of Ward was less persistent and less protracted than the questioning of Hubbard, Simonds and Woodward in this case. Hubbard was questioned on four consecutive days, from April 25 to April 28, on three of those days for more than one period, and on one of those days, April 27, for most of the day by different Agents (supra, pp. 23-24). Simonds was questioned on three different periods on April 25, by three Agents on April 26, and during two periods on April 27. He was also questioned on April 28 (supra, pp. 25-26). Woodward was questioned during three different periods on April 25, and at least once on April 27 and April 28; he was questioned on at least two other occasions (supra, pp. 26-27). The parallel with *Ward's* case is indeed a close one. Another parallel will be found in *Chambers* v. *Florida*, 309 U. S. 227, where five days of intermittent questioning culminated in an all night examination (id., at 239).

Although the questioning in the cases of Queen, Rhodes and Ballew was considerably less persistent than it was in the case of the other three men, the Agents did question them beyond the point at which they could be expected to make statements which were voluntary in the real sense of the word.

Lisenba v. *California*, supra, is not authority to the contrary. There the petitioner was interrogated on April 19, 20, and 21, three consecutive days; then, on May 2, after a lapse of eleven days, he was again questioned and confessed after several periods of questioning, the final one lasting about eight hours. In that case, the Court stated that the lawless practices of the police, including the lengthy questioning, "took them close to the line" (id., at 191). The two dissenting Justices were of the opinion that those practices took them over the line.

It is submitted that on any basis of comparison the questioning of Hubbard, Simonds and Woodward in this case was much more persistent and protracted, when viewed as a whole, than the questioning of the petitioner in the *Lisenba* case.

It must also be borne in mind in the consideration of this entire case that the six persons who confessed here were uneducated workers, living in an isolated community, whose spirit had already been worn down by a bitter and losing strike which had lasted nine months at the time of the questioning. The protection which this Court was so alert to throw about the petitioners in *Ward's* case and in *Chamber's* case is fully as appropriate here.

The threat of mob violence, the second ground stated in *Ward's* case, was not, of course, present in this case. There was, however, a threat—a constant threat—which, in its own way, was just as efficacious in producing fear and wearing down resistance in these petitioners as the threat of mob violence in the case of Ward. The headquarters used by the F.B.I. for the purpose of interrogating the petitioners was also the Company-owned headquarters of the petitioners' most hated and feared enemies—Sheriff Biggs

and his deputies. It is impossible to think of a place which the Special Agents could have chosen for the questioning which was more calculated to induce the petitioners to desire the ordeal to come to an end than the place which was actually chosen. There, at the Y.M.C.A., the petitioners ate and slept with the men who had been intimidating them for months, with the men who had the special task of wearing them down. The effect of these surroundings is nowhere shown more clearly than in Hubbard's testimony that he preferred to go without sleep in the City Jail than to be quartered with such men (R. 216).

It is disingenuous to argue, as the Government has, that the deputies did not participate in the questioning of the petitioners (Memorandum on the Petition for a Writ of Certiorari, 33).[10] It would be just as valid to argue that, before a confession is ruled out as inadmissible on the ground that there were threats of mob violence, it must be shown that members of a mob must have questioned a prisoner. To argue this is to overlook the enormous psychological pressure which must have been exerted on the petitioners by virtue of living at such close quarters with their armed enemies.

The third ground justifying reversal, as set forth in *Ward's* case, is illegal detention, without advice of friends or counsel. In this case, there is no pretense that any of the six petitioners were legally arrested or that holding them without arraignment was legitimate. In *Lisenba v. California*, supra, this Court condemned in the severest terms the State officers who engaged in such practices, but was reluctant to find that the confession was thereby

[10] Even this argument collapses when note is taken of Sheriff Biggs' significant admission that he did question the prisoners. When Biggs was explaining on the stand why Sid Howell, Woodward's father-in-law, may not have been able to see the latter, he said, "he possibly was not allowed to see him while he was being talked to by me or some of my officers" (R. 555). The Government argues, on the one hand, that the men "were held by the sheriff on his own initiative" (Memorandum on the Petition for a Writ of Certiorari, 31, n. 21), and on the other, that "the deputies did not participate in the questioning" (id., at 33). Since the sheriff and not the F.B.I. held the men, and since the F.B.I. and not the sheriff asked the questions, are they each chargeable with the acts of the other?

coerced. As we read *Ward's* case, the Court has now taken the further step. In that case the Court held that the illegal arrest and the failure to arraign were in themselves sufficient to warrant the exclusion of the confession.

Moreover, there can be no question that none of the petitioners who confessed saw lawyer, friend, or relative from the time he was taken prisoner until the time he confessed. The testimony of the petitioners that their requests for counsel were refused, and the opposing testimony of the Special Agents that no such requests were made, is beside the point. There is no indication in *Chambers* v. *Florida*, supra, or *Ward* v. *Texas*, supra, that the petitioners requested the benefit of counsel. The Government should not be permitted to argue that cases such as these should turn on the extent to which untutored victims of lawless officials comprehend their essential rights. If fundamental rights are to have any meaning, an objective test must be applied —did the petitioners have the benefit of counsel? No interference with proper law enforcement methods is invited by such a test.

In any event, the evidence clearly discloses that no one from the outside could have seen any of the petitioners if he had wanted to. The testimony of Sid Howell, Woodward's father-in-law, that he was turned away by deputies on two different occasions is uncontradicted; Sheriff Biggs admitted that he kept "outsiders" away (R. 554), and that he was unwilling to have the questioning of the petitioners interfered with (R. 555). The fact is that in this case counsel and relatives had difficulty in seeing the petitioners even after the arraignment.

The next ground for reversal stated in *Ward's* case is the attainment of the confession by taking the prisoner "to lonely and isolated places for questioning" (86 L. Ed. 1101, at 1105). This precise element is not present in this case, but here again the parallel is supplied by the fact that the petitioners were questioned at the headquarters of Sheriff Biggs and his deputies. This Court has excluded confes-

sions secured upon questioning in lonely and isolated places only because questioning in such surroundings obviously induces fear and breaks down resistance. It has already been demonstrated that questioning at the headquarters of Sheriff Biggs was more likely to produce such consequences with these petitioners than questioning under any other surroundings.

We come now to additional elements not present in the *Lisenba* and *Ward* cases but present here. The Government has conceded that Chief Deputy Sheriff Campbell told "four or five" of the prisoners that Special Agent in Charge Plaxico had said he would "recommend a parole for those boys that come clean" (R. 273; Government's Memorandum on the Petition for Writ of Certiorari, 35). The Government insists, however, that it was not shown that the statement was repeated to the petitioners before the confessions had been signed (id.). As we have shown, however (supra, pp. 32-33), Campbell repeated the statement before the men had confessed.

A further significant inducement is shown by the evidence. This was the promise of favorable treatment in the form of low bail bonds (supra, pp. 30-31). The Government concedes that Commissioner Anderson's disinterested testimony on this issue is persuasive (Government's Supplemental Memorandum on the Petition for Writ of Certiorari, 5).

Physical mistreatment, also an issue put aside in the *Lisenba* and *Ward* cases, was present here. No effort was made at the trial to rebut the testimony as to conditions at the City Jail, where Hubbard spent one night, Simonds two nights, and Woodward three nights, before they confessed. Queen and Rhodes spent their only night before they confessed in the City Jail, and Ballew spent his only night before he confessed being shuttled by his captors between the City Jail and two different cells in the Hamilton County Jail at Chattanooga.

On the issue of physical mistreatment the testimony of four of the petitioners that they were given nothing to eat the first night they were held may not loom large. But even this testimony is highlighted by the callous comments of Special Agent Roach about Simonds that "I was not interested in whether he had anything to eat", "he was not in my custody" (R. 174), "I didn't care whether he had anything to eat" (R. 429).[11] The evidence fairly shows that the petitioners lost weight substantially under the strain of the questioning (supra, p. 37).

Finally, there is the evidence that the Agents continued to question the prisoners until they told stories which harmonized with the situation as the Agents had constructed it (supra, pp. 37-39). Even though the Agents denied that they used the term "liar" when they rejected answers given by the petitioners, it is obvious that the effect of the approach taken by the Agents was the same. This form of coercion certainly contributed to the collapse of the self-possession of the prisoners.

B.

The cases cited by the Circuit Court of Appeals (124 F. [2d] 58, 67-68) are not in point. To say that a confession made to police officers while in their custody and in answer to their questions is voluntary (*Pierce* v. *United States*, 160 U. S. 355; *Hardy* v. *United States*, 186 U. S. 224; *United States* v. *Tod*, 263 U. S. 149; *Perovich* v. *United States*, 205 U. S. 86), merely brings us to the threshold of the fundamental issue in this case.

[11] This testimony of Special Agent Roach, peripheral though it is, demonstrates perhaps more than anything else in the record the novel method employed by the Special Agents of the F.B.I., whereby they divested themselves of responsibility for the petitioners while leaving themselves free to question them without restraint. Even though the Agents rushed to the scene to investigate a crime against Federal property, they made no pretense of arresting any suspects or conducting an independent investigation. The record makes it clear that the Federal Agents relied completely on Sheriff Biggs even though they were investigating a Federal crime (see, e.g., Roach, R. 172-173). The Government cannot disclaim responsibility by saying that the men "were held by the sheriff on his own initiative" (Memorandum on the Petition for a Writ of Certiorari, 31 n. 21; see, also, supra, p. 44, n. 10).

C.

It is unfortunate that a case raising the constitutional validity of some of the law enforcement methods employed by certain Agents of the Federal Bureau of Investigation should come before the Court at a time when it is more essential than ever to maintain the purity of the law enforcement method of the Federal Government. If the people are to be united in their struggle against the greatest enemy the Bill of Rights has ever had, they must have the conviction that the Bill of Rights remains intact to be defended. It is doubly unfortunate that such an issue should arise in a case growing out of a labor dispute.

This Court, it is respectfully urged, should continue the inspiring tradition established in those cases decided in recent years—of which *Ward's* case is the latest landmark—that it will not tolerate such lawless practices of law enforcement officials as are disclosed by this record, that such practices are worthy only of our enemies. This is a case which will bear repetition by this Court of what it said in *Chambers* v. *Florida*, supra:

> "We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws. The Constitution proscribes such lawless means irrespective of the end. And this argument flouts the basic principle that all people must stand on an equality before the bar of justice in every American court. Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court,

than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion" (309 U. S. 227, at 240-241).

II

The erroneous admission of any one of the confessions constituted prejudicial error to all other petitioners implicated by such confession.

In *Glasser* v. *United States*, 315 U. S. 60, this Court stated "* * * where error as to one defendant in a conspiracy case requires that a new trial be granted him, the rights of his co-defendants to a new trial depend upon whether that error prejudiced them." *Dufour* v. *United States*, 37 App. D. C. 497, which was one of the cases cited by the Court in support of the above-stated rule, held, under the circumstances there involved, that the granting of a new trial to one of the defendants did not entitle his co-defendant to a new trial. In the course of its opinion the court stated:

> "Had a new trial been awarded Huston upon the ground of error in the admission of evidence, and that evidence had also related to the other defendants and had been in any manner to their prejudice, all the defendants would necessarily have been entitled to a new trial" (37 App. D. C. 497, 510).

The facts presented here fall squarely within the circumstances under which the Court of Appeals of the District of Columbia has stated it will direct a new trial for the co-defendants in a prosecution for conspiracy. Each confession involved here related to the other petitioners and implicated them. Although the confessions were introduced with the names of the alleged co-conspirators deleted, such deletions were rendered meaningless by the

inclusion of the names of the alleged co-conspirators when the confessions were read into the record during the cross-examination of the petitioners. Thus, Woodward's confession as read into the record, and denied by him on his cross-examination, implicated Anderson, Ellis, Simonds, Hubbard, Rhodes and Queen in the alleged conspiracy (R. 707-712). In a similar manner, Hubbard's confession implicated Anderson, Simonds and Woodward (R. 672-678); Simond's confession implicated Anderson, Woodward, Rhodes, Queen and Ballew (R. 662-666); Rhodes' confession implicated Woodward, Simonds and Queen (R. 740-745); Queen's confession implicated Woodward, Simonds, Ballew and Rhodes (R. 684-689); and Ballew's confession implicated Simonds and Queen (R. 759-761). In a more general manner, each confession strengthened the proof aliunde concerning the existence of a conspiracy among the defendants. To what extent each confession occasioned inferences in the minds of the jurors concerning the guilt of the other petitioners can not be determined, of course. That each confession did cause some inferences, which would not have been present otherwise, and that this prejudiced the other defendants, no reasonable man, after an examination of the record, would deny. It follows, therefore, under the rule laid down in *Dufour* v. *United States*, supra, that the erroneous admission of any one confession constituted error at the least to those petitioners directly implicated by such confession, and more correctly, because of the real possibility of prejudice to the others, to all of the other petitioners.

The fact that the trial court instructed the jury that no extra-judicial statements of defendants implicating co-defendants could be binding on such co-defendants made the various individual confessions admitted no less prejudicial to all the other petitioners. Such an instruction is required by law when a concededly *admissible* confession of one co-conspirator is introduced in evidence at the trial of several conspirators. That the instruction does not re-

move the prejudicial effect of the evidence on the other co-defendants has been recognized by the courts. "A statement by one of several co-defendants which is in the nature of a confession is admissible in evidence under proper instructions, although such a statement may indirectly influence the minds of the jury against the other defendants on trial. The mere fact that evidence legally admissible against one of several defendants may prejudice his co-defendant, is no reason for its exclusion." *Commonwealth* v. *Berman*, 181 A. 244, 249. See, also, *Cochran* v. *United* States, 41 F. (2d) 193, 206 (C. C. A. 8).

Consequently, although the confessions here could not be excluded solely on the ground that they prejudiced the other defendants, the fact that they were prejudicial to them, as shown above, remains. When it is established that it was error to admit any one of these confessions against the defendant making it, then its prejudicial effect on the other defendants is wholly unjustified by the requirement that the jury be permitted to consider all admissible evidence, and thus constitutes reversible error as to them.

III

The lack of corroboration of the confessions of Queen, Rhodes, and Ballew rendered their conviction erroneous as a matter of law.

The court below recognized in its opinion that there was no evidence in the record connecting petitioners Queen, Rhodes, and Ballew with the charge laid in the indictment other than their respective confessions, which had been repudiated. 124 F. (2d) 58, 64. It also recognized the rule, representing the great weight of authority in the United States, that there can be no conviction of an accused in a criminal case upon an uncorroborated confession. 124 F. (2d) 65. Nevertheless, it held that the trial court did not err in refusing to direct a verdict of not guilty as to

these three petitioners, basing its decision on the ground that the evidence aliunde in the record of the mere existence of the conspiracy was sufficient corroboration of the confessions as a matter of law. It is our contention that neither in authority nor in policy was the Circuit Court warranted in its ruling.

No previous case has held that a confession *alone* is sufficient to prove participation in a crime once it has been proved that the crime was committed. The cases cited by the Circuit Court of Appeals in support of its holding that the evidence in the record of the mere existence of the conspiracy was sufficient corroboration of the three confessions in question do not permit of such interpretation. In *Rosenfeld* v. *United States*, 202 F. 469 (C. C. A. 7), *Berryman* v. *United States*, 259 F. 208 (C. C. A. 6), *Wiggins* v. *United States*, 64 F. (2d) 950 (C. C. A. 9), *Pearlman* v. *United States*, 10 F. (2d) 460 (C. C. A. 9), and *Litkofsky* v. *United States*, 9 F. (2d) 877 (C. C. A. 2), the issue involved was the sufficiency of the evidence independent of the confessions to corroborate the latter, there being present in each case independent evidence of the defendant's connection with the crime charged. Only in *Ryan* v. *United States*, 99 F. (2d) 864 (C. C. A. 8), was the question of proof of the defendant's connection with the crime by independent evidence directly at issue, and there the decision affirming the conviction was based on the presence of such evidence in the record.

Further, there is no compulsion in the other decisions involving the corroboration of confessions for a holding that a confession alone is sufficient proof of a defendant's connection with the crime charged. *Vinkemulder* v. *United States*, 64 F. (2d) 535 (C. C. A. 5), certiorari denied, 290 U. S. 666, involved a conviction for illegally transporting alcoholic beverages in interstate commerce. The defendant, who, according to independent evidence, had flown a plane on an interstate journey, in which liquor had been found, contended that his confession that the liquor had

been in the plane during the entire journey was inadmissible. The court ruled otherwise. Here, the admissibility of the confession was involved, and the court permitted its admission in order to resolve any doubt in the minds of the jurors as to defendant's transportation of the liquor, for which inference there was substantial independent evidence.

In *United States* v. *Marcus*, 53 Fed. 784, error dismissed *Marcus* v. *United States*, 159 U. S. 259, the question also raised was the *admissibility* of the defendant's confession that he had passed a counterfeit bill. There was substantial independent evidence in the record to warrant an inference that the bill had been passed by the defendant.

In *Murray* v. *United States*, 288 Fed. 1008 (App. D. C.), certiorari denied 262 U. S. 757, the error presented was the refusal of the trial court to charge that the defendant's confession could not be considered by the jury unless independent evidence of the defendant's commission of the crime had established the defendant's guilt beyond a reasonable doubt. The appellate court held the refusal proper, and correctly did so. The case, however, in no way upheld the proposition that a confession alone is sufficient to prove defendant's participation in the crime, and there was, in the record of the case a substantial amount of independent evidence warranting an inference of such connection.

Thus, it can be stated that there is no express holding in the cases which supports the ruling of the Circuit Court of Appeals. The question then arises whether such a ruling is implied by the previous cases. At first glance, it would so seem. The courts have stated the requirements of corroboration in these cases in terms of the *corpus delicti*, *i. e.*, independent proof of the *corpus delicti* has been held to constitute sufficient corroboration of a confession to warrant a conviction. The courts have also stated in several cases that the identity of the accused is not a part of the *corpus delicti*. *Vinkemulder* v. *United States*, supra: *United States* v. *Marcus*, supra: *Murray* v.

United States, supra. It would thus seem that mere proof of the existence of the criminal conspiracy here was proof of the *corpus delicti*, and satisfied the requirement of corroboration, and that the absence of *any* independent evidence connecting these petitioners with the conspiracy here involved was immaterial. It is our contention, however, that such an inference is completely unwarranted on two grounds.

In the first place, it has been recognized that the identity of the accused may properly be a part of the *corpus delicti* which must be proved by independent evidence. In *Forte* v. *United States*, 94 F. (2d) 236 (App. D. C.), the crime charged was the transportation in interstate commerce of a stolen car, with knowledge that it was stolen. In its discussion of the requirement of corroboration, the Court stated:

> "The 'corpus delicti' does not properly include, as a third element, the agency of the accused as the criminal. This would make the term synonymous with the whole of the charge, and such a definition has been repudiated. It would require, in view of the corroboration rule, that the whole of the charge, including the criminal agency of the accused be evidenced independently of the confession. It is to be noted, however, that in certain types of crimes involving scienter on the part of the accused it is not possible to separate, either conceptually or practically—that is in respect of the proof—the scienter, as an element of the corpus delicti, and the agency of the accused. So in the crime of receiving stolen goods knowing them to be stolen, and in the crime at bar, it is not possible to separate either conceptually or practically, the element of guilty knowledge in the transportation and the element of agency of the accused as the criminal. But this cannot operate to diminish the duty of the Government to present evidence of both elements of the corpus delicti independent of the confession" (94 F. [2d] 236, 244).

Similarly in this case, the *corpus delicti* includes the element of scienter on the part of each alleged conspira-

tor. As to each defendant "the evidence must convince that the defendant did something other than participate in the offense which is the object of the conspiracy. There must, in addition thereto, be proof of the unlawful agreement and participation therein, with *knowledge* of the agreement." *Langer* v. *United States*, 76 F. (2d) 817, 827 (C. C. A., 8) (our italics). And here also, it is not possible to separate, either conceptually or practically—that is in respect of the proof—the scienter, as an element of the *corpus delicti*, and the agency of the accused. Consequently, it follows that the requirement of corroboration of the *corpus delicti* here includes corroboration of the identity of each of the alleged conspirators, and the absence of such corroboration as to these three petitioners renders a conviction erroneous as a matter of law.

In the second place, were the view taken that the identity of the petitioners was not subject to corroboration by independent evidence, the rule of corroboration would be rendered meaningless here. In the words of the Circuit Court of Appeals below:

> "The grounds upon which the rule rests are the hasty and unguarded character which confessions often have, the temptation which, for various reasons, a party may have to state what would best serve his interest whether true or false, and the likelihood of misconstruing or incorrectly reporting what has been said and the danger of conviction where there has been no crime committed and the difficulty of disproving what has been said" (124 F. [2d] 58, 65).

The Court of Appeals of the District of Columbia gave an even more compelling reason for the rule in *Forte* v. *United States*, supra, when it stated that a real danger of false confessions, coerced or psychopathic, is created by the evidence in the decisions of the Courts, and the dependable reports of criminological investigations of lawlessness on the part of law enforcement officials (94 F. [2d] 236, 239). If it were possible to connect these three petitioners on the basis of their confessions alone with the alleged con-

spiracy here involved, precisely the situation, namely, a conviction on a false, coerced confession, that the rule of corroboration was designed to prevent could result. The requirement of the presence of some independent evidence of the defendant's connection with the crime would render such a result much less probable.

It is for these reasons that we maintain that the ruling of the Circuit Court of Appeals was erroneous. In our contention that the connection of the accused with the crime be designated an essential part of the *corpus delicti* in this conspiracy, we are merely insisting that the Court recognize that what is necessary for a conviction here is at least some independent evidence of the defendant's connection with the crime, a situation which has existed in every previous case we encountered upholding a conviction in which a confession was involved. A contrary view would ignore the character of a conspiracy, nullify the protection of the rule of corroboration, and facilitate the occurrence of injustice by removing a check to illegal and unscrupulous law enforcement techniques.

CONCLUSION

For the foregoing reasons, petitioners pray that the judgment of the court below be reversed, and that new trials be ordered for all of the petitioners.

Respectfully submitted,

LEE PRESSMAN,
Attorney for the Petitioners.

NATHAN WITT,
of Counsel.